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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-33

ILARIO ZANNINO and PETER LIMONE,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Rule 22(2) 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the First Circuit entered in the above-entitled cases on June 7, 1971.

The petitioners file herewith a single petition in accordance with Rule 23 (5), their appeals in the lower court having been heard on a consolidated record appendix.

Opinions Below

The opinion of the Court of Appeals for the First Circuit is not yet reported, but is annexed hereto as an Appendix, commencing at page 24.

The opinion of the United States District Court for the District of Massachusetts denying petitioners' motion for new trial is also annexed hereto as an Appendix, commencing at page 36.

Petitioners were charged and convicted as accessories before the fact of the offense. The two persons charged and convicted as the principals, Joseph P. Ballirò and Lewis M. Strauss, were tried with the petitioners and are filing a separate petition in this Court.

Judgments Below

The judgments of the United States District Court for the District of Massachusetts were entered on January 20, 1971.

The judgments of the Court of Appeals for the First Circuit were entered on June 7, 1971, and are annexed hereto as an Appendix, commencing at page 35.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254 (1) and Rule 22 (2).

The judgments sought to be reviewed are dated, and were entered June, 7, 1971.

Questions Presented

1. (a) In order to sustain a conviction under 18 U.S.C. §§ 2314 and 2(a) for "aiding and abetting" an interstate

transportation of stolen goods, is it necessary for the Government to prove knowledge on the part of the defendant, or, at least, reasonable grounds to know or foresee, that his conduct involves, or will result in, such transportation?

(b) Is such a defendant at least entitled to an instruction that such knowledge or notice is necessary to convict in the event that the jury finds the defendant to have "caused" the interstate transportation under 18 U.S.C. § 2(b)?

2. Are petitioners entitled to new trials on the basis of newly discovered evidence that three police officers were interviewing the Government's key witness at a time and place contradictory of a critical part of his testimony?

3. Did the trial court violate the "due process" rights of the petitioners by explicitly adding two years to the sentence of each on the basis of the sworn testimony of a witness at a Senate Committee hearing in 1963 that he heard that they were members of organized crime?

Statutes Involved

18 U.S.C.A.

§ 2. *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C.A.

§ 2314. *Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting*

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

. . . . . .

. . . . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Statement of the Case

A. *The Proceedings Below*

This is a petition seeking review of judgments of the Court of Appeals for the First Circuit affirming judgments of conviction of the District Court for the District of Massachusetts.

On March 26, 1970, an indictment was returned against the petitioners and Joseph P. Balliro, charging them with knowingly and wilfully transporting certain jewelry of more than $5,000 in value from New Hampshire to Massachusetts, knowing it to be stolen.

On September 10, 1970, a separate indictment was returned against Lewis M. Strauss, charging him with the same offense.

A bill of particulars was filed by the Government stating that the "stolen goods were transported from New Hampshire to . . . Massachusetts by automobile. An individual by the name of Lewis Strauss, acting on behalf of and for the defendants, Zannino and Limone, had custody and

control of the jewelry and drove the automobile. Strauss was accompanied by Defendant Joseph P. Balliro . . . . ."

Both indictments were joined for trial, which commenced on November 3, 1970, and concluded on November 16, 1970, with verdicts of guilty against the petitioners and their two co-defendants.

Motions for new trial were timely filed on November 27, 1970, and, after hearing on November 27, December 7, 8 and 11, 1970, the motions were denied on January 11, 1971.

Judgments of conviction were entered by the District Court on January 20, 1971, and were affirmed by the Court of Appeals for the First Circuit on June 7, 1971.

B. *The Facts.*

On March 24, 1966, two men, Erwin Soroko and Charles Lombardi, committed an armed robbery of Cortell's jewelry store.

Cortell's was located on Washington Street, in Boston, Massachusetts. Just a short distance away on the same street was the Intermission Lounge, a bar and restaurant owned by Balliro. Soroko who was the Government's chief witness and the *only* witness to the corpus delicti, worked as a cook at the Intermission.

"Early in the day" on Thursday, April 7, 1966, "around 1 o'clock in the afternoon", at the Intermission Lounge, Soroko promised Balliro a share of the proceeds if Balliro found a buyer for the jewelry. Balliro said that he would go downtown to talk to Larry (the petitioner Zannino), and then left. (R. 22-23).[1]

"Somewhere around half an hour to an hour later", Balliro returned to the Intermission and told Soroko that

[1] The letter "R." refers to the volume of the "Record" Appendix which contains the transcript of the trial and post-trial hearings and the exhibits.

Larry was still interested. Soroko said that he wanted to talk to Larry personally. Balliro then made a telephone call. (R. 24).

"About an hour later" or "within 3 or 4 o'clock" the petitioners Zannino and Limone arrived at the Intermission. Balliro was present. Zannino said he was interested in buying the jewelry. Soroko said he would sell it "piece by piece" and wanted a jeweler to look at it. Limone interrupted to tell Soroko not to worry about the money. Zannino said he had a man to look at the merchandise. Then he said, "Let me go back downtown and I'll get back to you." According to Soroko, "that was the whole conversation." (R. 25-26).

"Within an hour" after Zannino and Limone left, or "around 5 o'clock in the afternoon", at the Intermission, Balliro told Soroko that Zannino had called to say that he had located his man, who was willing to look at the stuff, and that all should meet at the Intermission at 6:30 o'clock on the following morning. (R. 28).

At 6:20 on the next morning, Friday, April 8, 1966, Soroko arrived at the Intermission, followed by Balliro. Strauss then drove up and was introduced to Soroko as "Larry's man." The three men then drove off to appraise the merchandise. Unknown, however, to Zannino and Limone, who did not go on the trip, was that the group had to cross the state line into New Hampshire, because Soroko and his partner, Lombardi, had hidden the loot at a summer cabin in Northwood, New Hampshire, owned by the parents of Soroko's girl friend, Joanne Ciulla, to whom he was later married. (R. 29-31, 35-36).

In the words of the trial court, there was "not a smidgen of evidence" indicating that either Zannino or Limone knew that the jewelry was located outside Massachusetts (R. 82).

At the cabin, a price of $60,000 was agreed upon and the

three men brought the jewelry back to Boston, arriving in the vicinity of the Intermission "around 2 o'clock sometime" on April 8. (R. 34-36).

On either Wednesday, April 20, or Thursday, April 21, Friday, April 15, 1966, or around 3 or 4 o'clock, in the Intermission, with Zannino and Balliro present, Limone gave Soroko $20,000 in part payment for the merchandise (R. 40-41).

On either Wednesday, April 20, or Thursday, April 21, 1966, around 2 or 3 o'clock, Soroko, Zannino, Limone and Balliro met at the Intermission and Zannino paid Soroko the balance of the $40,000 (R. 43-44).

Reasons for Granting the Writ

The reasons proposed by petitioners for granting the writ will be stated under each of the headings relating to the respective questions presented.

I. Interstate Scienter as a Necessary Element of the Proof against an Accessory.

As the law stands now in the First Circuit, if the petitioners had been charged with *causing* the interstate transportation of stolen *firearms,* the Government would have been required to prove that they had "knowledge . . . or, at least, reasonable grounds to know" that their conduct involved, or would result in, interstate commerce. *Nicolopoulos* v. *United States,* 332 F.2d 247, 248 (1st Cir. 1964). However, under the law of the instant case, having charged these defendants with *aiding and abetting* the interstate transportation of stolen *jewelry,* no such proof is required of the Government.

Nicolopoulos involved an interpretation of former 15 U.S.C. 902(g), now 18 U.S.C. 922(i), which provided, in pertinent part as follows:

> "It shall be unlawful for any person to transport ... or cause to be transported ... in interstate commerce any stolen firearm ... knowing ... same to have been stolen."[2]

The statute here involved, 18 U.S.C. 2314, provides, in pertinent part as follows:

> "Whoever transports in interstate . . . commerce any goods . . . of the value of $5,000 or more, knowing the same to have been stolen . . ."

The only discernible differences between *Nicolopoulos* and the instant case are those that may exist between stolen firearms and stolen jewelry and between an accessory who "causes" the offense and one who "aids and abets" it.[3] Notwithstanding the insignificance and shallowness of these differences, the appellate court seems to have seized upon both of them as the basis of its decision. In holding the requirement of foreseeability not applicable to the petitioners, the appellate court pointed out that the word "cause" is not written into Section 2314 as it is in the former firearms statute, 15 U.S.C. 902(g), and, in any event, the petitioners here were charged not with *causing* the offense under 18 U.S.C. 2(a), but, rather, with *aiding and abetting* it under 18 U.S.C. 2(b).

The distinction, we submit, is founded on pure sophistry and does nothing to enhance the law as a logical system of rules on which lawyers may rely in the conduct of

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[2] The successor statute, 18 U.S.C. 922(i), eliminated the words, "or cause to be", presumably because now already covered by 18 U.S.C. 2(b).

[3] The innocence or guilt of the principal actor is not a point of difference because in both the *Nicolopoulos* and instant cases the principals could be found to have been conscious of wrongdoing.

trials.[4] In the first place, the proposition that anything turns on the circumstance that the conduct of a causer is explicitly proscribed by former 15 U.S.C. 902(g) without the need for reference to 18 U.S.C. 2(b) hardly deserves comment. According to the Revisor's Notes, the whole purpose of 18 U.S.C. 2(b) was merely "to permit the deletion from many sections throughout the revision of such phrases as 'causes or procures' ". How then can anything be thought to turn on the accident that 15 U.S.C. 902(g) antedated the enactment of subsection (b) of 18 U.S.C. 2 and, therefore, continued to contain the language of causation until repealed and re-enacted without that language as 18 U.S.C. 922(i).

In the second place, the suggestion by the First Circuit that the argument of the alleged accessories, Zannino and Limone, "might have some merit had they been convicted under 18 U.S.C. § 2(b) [instead of under 18 U.S.C. § 2(a)]" needs barely more comment than the first proposition. Here, the result was reached by a gross misinterpretation of Judge Learned Hand's language in *United States* v. *Peoni*, 100 F.2d 401 (2d Cir. 1938), where he said, with reference to the predecessor statute of 18 U.S.C. 2(a), at 402:

> "It will be observed that all these definitions [of the words "aid", "abet", "counsel", etc.] have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.

[4] In this case, the fact is that defense counsel recognized the Government's failure of proof at a very early stage of the trial and, in reliance on *Nicolopoulos*, adapted their trial strategy, particularly the cross-examination of Soroko, to this deficiency.

> All the words used—even the most colorless, "abet" —carry an implication of *purposive attitude* towards it." (emphasis added)

The point being made by Judge Hand is that an accessory is not responsible for the consequences of his acts merely because the forbidden result would *probably* follow upon his conduct; *something more is required*, namely, that he intend the result to occur. By the insertion of a bracketed phrase ("all that is required is") into this quotation from Judge Hand, the First Circuit reverses the concept and erroneously interprets the quotation to mean that *something less* is required than the mere probability that the forbidden result will follow and that this *lesser* element is the accessory's *intent* to make the venture succeed! (App. p. 28, *infra*).

We submit that the *Nicolopoulos* case was correctly decided because grounded on two decisions of this Court, *Pereira* v. *United States*, 347 U.S. 1 (1954) and *United States* v. *Sheridan*, 329 U.S. 379 (1946), which remain to this date the leading authoritative opinions laying down the requirements with respect to the proof of an accessory's intent or the foreseeability of the consequences of his acts.

Pereira involved prosecutions under the mail fraud statute *and Section 2314*. With respect to the issue whether the defendant "caused" a mailing within the meaning of the mail fraud statute, the Court said, 347 U.S. at 8-9:

> "Where one does an act with *knowledge* that the use of mails will follow in the ordinary course of business, or where such use can *reasonably be foreseen*, even though not actually intended, then he 'causes' the mails to be used." (emphasis added)

With reference to the *Section 2314* violation, the Court said, 347 U.S. at 9:

> "When Pereira delivered the check, drawn on an out-of-state bank, to the El Paso bank for collection, he 'caused' it to be transported in interstate commerce. It is *common knowledge* that such checks must be sent to the drawee bank for collection, and it follows that Pereira *intended* the El Paso bank to send this check across state lines." (emphasis added)

The *Sheridan* case involved a prosecution *only* under the predecessor of *Section 2314*. The Court said, 329 U.S. at 391:

> "A word will dispose of the idea that Sheridan did not 'cause' the transportation. Certainly he *knew* the checks would have to be sent to the Missouri bank for collection. Given the proven forgery and uttering, no other conclusion would be possible. Necessarily, too, it would follow he *intended* the paying bank to send the checks there for that purpose. He *knew they must cross state lines to be presented.* One who induces another to do exactly what he intends, and does so by defrauding him, hardly can be held not to 'cause' what is so done." (emphasis added)

The same requirement of foreseeability has been applied to the law of conspiracy by analogy to the law relating to the responsibility of aiders and abettors. In *Pinkerton* v. *United States,* 328 U.S. 640 (1946), this Court, in holding each conspirator responsible as a principal for substantive offenses committed by his co-conspirators in furtherance of the conspiracy, said, at 647:

> "The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle."

The significance of *Pinkerton* to the instant issue is the language which follows almost immediately upon the foregoing quotation, 328 U.S. at 647-648:

> "A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be *reasonably foreseen* as a necessary or natural consequence of the unlawful agreement." (emphasis added)

The analogy to the instant case is perfect. Since conspirators are by definition culpable, rather than innocent, agents, it is apparent from the foregoing that this Court considers the foreseeability test of the *Pereira* and *Sheridan* cases, involving innocent agents, to be equally applicable where the defendant procures the commission of the offense through a culpable agent, as in the instant case.

Other circuits have also applied the foreseeability test to conspirators and accessories acting through culpable agents. *United States* v. *De LaMotte*, 434 F.2d 289 (2d Cir. 1970) ("the accessory is liable for any criminal act which, in the ordinary course of events, was the natural or foreseeable consequence of the crime that he advised or commanded." *Id.* at 293); *United States* v. *Coppola*, 424 F.2d 991 (2d Cir. 1970) (inference that defendants "foresaw the bonds would be redeemed outside the State" held too "tenuous." *Id.* at 994); *King* v. *United States*, 364 F.2d 235 (5th Cir. 1966) ("mere fact that an act is 'wrongful'

... does not make the actor guilty for ... subsequent violation—unless the purposive intent can be shown." *Id.* at 241); *United States* v. *Leggett,* 269 F.2d 35 (7th Cir. 1959) (defendant knew that stolen motor vehicle "had to be transported in interstate commerce." *Id.* at 37).

In *United States* v. *Scandifia,* 390 F.2d 244 (2d Cir. 1968), involving a violation of 18 U.S.C. 2314, the Second Circuit said, at 249:

> "Every enlightened system of jurisprudence, therefore, must have rules or guidelines to determine when a person will no longer be held responsible for a result 'caused in fact' by his act or omission.
>
> . . . . . .
>
> "We would hesitate to endorse the principle that a causal relationship could be found here merely because the interstate transportation was not in any way inconsistent with Scandifia's instructions and redounded to his benefit. In the absence of some evidence that Scandifia intended, knew, or could have reasonably foreseen that the innocent persons to whom he entrusted the bonds would take them across state lines, we question whether the jury would have been justified in concluding that he did more than provide others with the opportunity to do that which the law forbids. And, to provide an opportunity would not seem *ipso facto* to brand one as the causer ..."

United States v. *Kierschke,* 315 F.2d 315 (6th Cir. 1963) and *United States* v. *Tannuzzo,* 174 F.2d 177 (2d Cir. 1949), although relied on by the First Circuit, seem actually to be consistent with the foreseeability test. In both cases, the issue involved a thief who had placed bulky and highly visible stolen merchandise in the hands of others for sale

on his account. In such circumstances, involving a whole truckload of furs in *Tannuzzo* and at least $10,000 worth of automobile tires in *Kierschke*, it is not unreasonable to suppose that the thief would expect a prudent fence to dispose of goods of such bulk at a sufficient distance from the place of the theft to avoid recognition. It may logically be argued that an accessory to the *sale* of stolen goods would consider the farther removed their sale, the better.

On the other hand, the instant case involves a *purchase* with all its contacts within the Boston area and its essential contacts within a few blocks of each other. According to the evidence, the robbery took place on Washington Street, only a few blocks from the Intermission Lounge where the initial negotiations, the agreements for purchase, and two separate payments were made. Moreover, Soroko, the robber and vendor of the stolen jewelry, and Ballirò, the alleged intermediary, were both employed on the premises of the Intermission. The furthest points from the place of the robbery that could have been known to the purchasers were the residences of Soroko and of his girlfriend in Brookline and Winthrop, respectively, communities adjoining the City of Boston. Even the purchasers, themselves, lived and worked in the Boston area. Under these circumstances, it could hardly be said that the defendants might reasonably have expected that their *purchase* was going to involve an interstate transportation, as distinguished, possibly, from their later re-sale.

Even the trial court's instruction to the jury in the instant case seems implicitly to recognize the necessity for some kind of foreseeability standard. It charged the jury that they may convict if they found that the alleged accessories, Zannino and Limone, authorized the alleged principal, Strauss, "to transport the stolen jewelry from wherever it was back to Boston without any restriction or limitation on Strauss's authority to the effect that he might

not cross a state line" (R. 475-476). The vice of this instruction is that it assumes in the first place that the interstate crossing is foreseeable; otherwise, it would not occur to the accessory that there was any need for the limitation on the principal's authority. The instruction, therefore, if proper at all, is actually the second part of a fully developed foreseeability standard: The first question is whether the interstate crossing is foreseeable; if not, the accessory is to be acquitted; on the other hand, if it is foreseeable, then the second question, whether the accessory limited the principal actor's authority, must be answered.

It is true, of course, as noted in the appellate court's opinion, that 18 U.S.C. 2314 does not in terms require knowledge of the interstate character of the transportation. It may, therefore, be reasonable to assume for the sake of argument that its intent is to cast on the principal actor the risk that his transportation may extend across a state line. This may be particularly so because his possession of knowingly stolen goods is inherently illicit and in any event he can with relative ease avoid the interstate crossing.

An accessory, however, stands on a different footing. He is not in actual possession of the stolen goods and, under some circumstances, there may be nothing inherently wrongful in causing a mere *transportation* by another of goods known to be stolen, as, for example, where one requests the thief to remove stolen jewelry from their place of concealment merely in order to observe or admire them, but without participation in their possession. Moreover, an accessory is usually not in the same position as the principal to avoid the crossing of a state line. His liability, therefore, should rest on the foreseeability of the interstate transportation.

A final question flows from the foregoing: If the First Circuit is correct and the legal consequences that attach

under subsection (b) of 18 U.S.C. 2 differ from those under subsection (a), then were not the alleged accessories necessarily entitled to an instruction that, if the jury found that they did not "aid and abet", but rather "caused" the interstate transportation, they must be acquitted unless it also found that they knew of the interstate nature of the transportation.

All these questions, we submit, are of sufficiently broad importance to merit the consideration of this Court. As the Department of Justice said in a motion to enlarge time filed below in the Court of Appeals, this issue

> "raises an important question relating to the interpretation of the National Stolen Property Act, Title 18, United States Code, Section 2314, and the Department of Justice desires more time to adequately state its position involving, as it does, the uniform enforcement of an important criminal statute."

Indeed, the standard of foreseeability urged here by the alleged accessories is the very standard which the Government was willing to accept in the recent case of *Rewis* v. *United States*, —— U.S. ——, 91 S. Ct. 1056 (4/5/71).

Particularly urgent, we submit, is the need for this Court to determine whether the concept of foreseeability as enunciated in *Pereira*, *Sheridan* and *Pinkerton*, and as recognized by the various circuits, has any continuing vitality.

II. Newly Discovered Evidence Contradictory of the Government's Key Witness as the Basis for a New Trial.

At the trial, the Government's key witness, Soroko, had testified that the events of April 7, 1966, had occurred at the Intermission Lounge between 1:00 and 5:00 p.m. (R. 22, 28). As the result of newly discovered evidence offered

by petitioners, the trial court found that Soroko was mistaken as to the beginning time, 1:00 p.m. (App., p.39, *infra*). Since the Court of Appeals considered 2:00 p.m. as sufficiently favoring the Government's position (App., p.31, n.5, *infra*), we accept that hour as marking the beginning time for the purposes of the issue raised here.

The newly discovered evidence consisted of the testimony of two Boston detectives and a state police lieutenant, putting Soroko at the Buy-Rite meat market, on Boston's Blackstone Street, at some time after 12:00 o'clock noon of April 7, 1966. This evidence flatly contradicted Soroko's testimony that he was at Joanne's home during her children's school lunch hour, which began at 11:45 a.m., and that, after the lunch hour, he proceeded directly to the Intermission Lounge.

The newly discovered evidence consisted also of an entry in the notebook of one of the Boston detectives, George Timmons, that Soroko's appearance at the Buy-Rite occurred at 3:30 p.m. on April 7 (R. 777). As the Court of Appeals stated in its opinion, "[t]his evidence directly contradicted Soroko's testimony at trial that at 3:30 p.m. on April 7 he was in the process of negotiating with Zannino and Limone at the Intermission Lounge, one mile away from Blackstone Street." (App. p. 28, *infra*).

At the hearing on the motion for a new trial, Timmons and another Boston detective, Elmer Brooks, testified that, on April 7, 1966, they left the Boston Municipal Court at about noon (R. 541), returned to the Division 2 Police Station (R. 541, 564), had lunch (R. 542, 564), obtained an unmarked police car (R. 543, 564), drove over to Blackstone Street (R. 543, 564), and there interviewed Murray Alpert, the owner of the Buy-Rite, who stated that Soroko was expected momentarily to pick up a canned ham (R. 543). They then returned to their car to await Soroko's arrival (R. 544).

After sitting in the car for "quite awhile" (R. 544), Timmons saw Soroko in a Falcon passing around the unmarked police car. He could get only the first three numbers of the Falcon and jotted them down. The Falcon angle-parked with its rear end toward the meat company. Soroko then entered the store. When he returned to the Falcon, Detective Brooks left the police car and engaged him in a short conversation. When Brooks returned to the police car, he was asked by Timmons whether he got the whole registration number of the Falcon. Brooks said that he did not. The officers then tried to follow Soroko, but were unable to do so because of the heavy traffic. (R. 544-545, 559-562, 567).

State Police Lieutenant James DeFuria testified that the three officers left the Municipal Court "around close to noontime" (R. 573) and that he saw Soroko on Blackstone Street "anytime after 12 o'clock to 1:00, 1:30 at the latest" (R. 570). However, he could not remember whether he ate lunch or returned to the police station after leaving court. Indeed, he could not remember any of the events which occurred from the time he left court until the time he saw Soroko, nor even approximately how long a period of time elapsed between those two events. (R. 573-576). All he could say when asked how he fixed the time of the incident was, "Well, I am just going back in my memory on that day. I thought it was early afternoon, after court, sometime shortly after court" (R. 571). He was able to recall, however, waiting outside the Buy-Rite for 15 or 30 minutes while Brooks and Timmons interviewed Alpert (R. 574).

Soroko, who was largely corroborated by his wife, testified that he arrived at theBuy-Rite around 11 o'clock in the morning. The latest was 11:15. The very latest was 11:30. It was not as late as 12:00 o'clock. (R. 630-631). He spent 15 or 20 minutes at the Buy-Rite (R. 628) and then made

a 15 or 20 minutes' trip to Joanne's home (R. 634). Joanne's two sons were on their school luncheon recess. Soroko was present while Joanne made them sandwiches and they ate. She made coffee for herself and Soroko. After he finished his coffee, he stayed "around 15 or 20 minutes" and left. (R. 634-639).

Soroko further testified that he then went from Joanne's home to the Intermission where he met Zannino and Limone. He did not leave the Intermission to go back to the Buy-Rite. (R. 629).

There was also testimony, from the principal of the school attended by Joanne's children, that the lunch hour was between 11:45 a.m. and 12:45 p.m. (R. 709-710). The events of this lunch hour were recounted by Soroko in the most exquisite detail and served as his frame of reference for his testimony that it was before the lunch hour that he had the police encounter at the Buy-Rite and it was after the lunch hour that he went directly to the Intermission. Therefore, if Soroko's testimony were true, the only possible time he could have been at the Buy-Rite was before 11:45 a.m.; and he so testified, insisting that the latest time the episode at the market could have occurred was 11:30 a.m. (R. 630-631).

On the other hand, the incident could not have happened before 12:00 o'clock noon, because it was not until that time that the officers left the Municipal Court. Moreover, additional time was spent by them in returning to the station house, having lunch, interviewing Alpert and waiting for Soroko's arrival before the encounter could have taken place.

The manner in which *four* judges, including the trial judge and the three-judge panel of the First Circuit, resolved this issue against the petitioners is almost too painful to state. According to the findings of the trial judge, as quoted by the First Circuit, "the episode at the meat

market most probably occurred between 12 and 1 o'clock" (App., p. 30, *infra*), and Soroko arrived at the Intermission closer to 2:00 p.m. than to 1:00 p.m. He was, according to the findings, essentially truthful, but slightly mistaken as to time when he testified that the Blackstone Street incident occurred no later than 11:30 a.m. and that he arrived at the Intermission about 1:00 p.m. However, nowhere in the opinion of either the trial court or the appellate court are we given any clue as to how this finding can be possibly squared with Soroko's positive and detailed testimony of having spent the school lunch hour, beginning at 11:45 a.m., with Joanne's children at their home and going directly from there to the Intermission.

In upholding the trial court, the First Circuit discussed the several tests for determining whether newly discovered evidence warrants a new trial, including those exemplified by its interpretations of *Berry* v. *Georgia,* 10 Ga. 511 (1851) (newly discovered evidence must be such as would probably produce an acquittal), *Larrison* v. *United States,* 24 F.2d 82, 87-88 (7th Cir. 1928) (testimony given by material witness must be false and, without it, jury might have reached a different conclusion), *United States* v. *Miller,* 411 F.2d 825, 830 (2d Cir. 1969) (newly discovered evidence tested against both of the foregoing standards), *Newsom* v. *United States,* 311 F.2d 74, 79 (5th Cir. 1962) (where evidence supporting conviction was weak, another jury may reasonably find the new evidence sufficiently credible to raise a reasonable doubt as to guilt) and *Mejia* v. *United States,* 291 F.2d 198 (9th Cir. 1961) (jury might come to a different conclusion in light of testimony of newly discovered alibi witness). It then accepted as supported by the evidence the trial court's findings that Soroko's trial testimony was not false and that the new evidence would not probably produce an acquittal. Finally, it concluded that

it "must affirm the findings of the trial court so long as there is evidence to support them", citing *United States* v. *Johnson*, 327 U.S. 106, 111-112 (1946). (App. p. 31, *infra*)

In reaching this conclusion the First Circuit applied only the "traditional tests" of the *Berry* and *Larrison* cases, although it recognized the existence of other tests. Therefore, the issue is squarely presented here as to whether the "traditional tests" are exclusive. Moreover, this issue is presented in a factual context that quite strongly favors the defendant, thereby presenting to the Court an opportunity to set further guidelines on the extent to which appellate courts are bound by the ultimate conclusions of fact made by the trial judge.

These questions, we submit, are of such broad importance to the administration of criminal justice in the federal courts as to call for decision by this Court.

III. Hearsay as the Basis for a Specific Addition to a Sentence.

The reports of presentence investigation with respect to the two alleged accessories, Zannino and Limone, stated that these two petitioners had been "named" in Senate Hearings, held in 1963 and 1969, respectively, as members of organized crime.

The trial court stated, in imposing sentences of seven years on each of these petitioners, that it wished "to indicate the precise effect that I give to this reputation allegation". It then proceeded to explain that the seven years' sentences were divided into five years for the crime and prior record of the petitioners and two years for the reputation arising out of the testimony before the Senate Committees. (Supplemental Record Appendix, 11-13).

The First Circuit, in upholding the sentence, noted that "the evidence in question was not idle gossip but sworn

testimony presented in the course of formal congressional investigations" and that "counsel were given an opportunity to attempt to rebut this evidence". (App. p. 32, *infra*).

The "evidence", however, to which the First Circuit refers consists merely of sworn testimony given in 1963 by a Boston police officer, who simply distilled the essence of all the idle gossip which had reached official ears. Then, in 1969, the Attorney General simply submitted to a Subcommittee a chart or list of names, repeating the accusation made in 1963.

In the starkest terms, what the trial court did was to treat these groundless accusations as convictions, for which two years was considered a proper sentence. Moreover, it is significant that the reputation was given to the petitioners by a law enforcement officer "trained to prosecute" and was not the result of an investigation by a probation department "trained.... to aid offenders." See *Williams* v. *New York*, 337 U.S. 241, 249 (1949).

In *Williams*, this Court held that a sentencing judge may draw on hearsay information contained in a presentence report without offense to the "due process" clause of the Fourteenth Amendment. However, "Mr. Justice Black, writing for the majority, noted that the sentencing procedure is not immune from 'scrutiny under the due process clause (337 U.S. at 252, n. 18)'." See *United States* v. *Rao*, 296 F.Supp. 1145, 1149 (S.D. N.Y. 1969) (alleged membership in Mafia cannot constitute a predicate for punishment).

We suggest that this issue will continue to present itself in the future, but not soon again in such explicit form. *Certiorari* should be granted because the case affords a rare opportunity to give some uniformity to the most subtle part of the criminal process, namely, the manner by which the sentencing judge arrives at his ultimate result.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

For the First Circuit

No. 71-1036.

UNITED STATES OF AMERICA,

APPELLEE,

v.

LEWIS M. STRAUSS,

DEFENDANT, APPELLANT;

No. 71-1037.

UNITED STATES OF AMERICA,

APPELLEE,

v.

ILARIO ZANNINO,

DEFENDANT, APPELLANT;

No. 71-1038.

UNITED STATES OF AMERICA,

APPELLEE,

v.

JOSEPH P. BALLIRO,

DEFENDANT, APPELLANT;

No. 71-1039.

UNITED STATES OF AMERICA,

APPELLEE,

v.

PETER LIMONE,

DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Francis J. DiMento, with whom *DiMento & Sullivan*, *Robert V. Mulkern*, and *Fusaro & Fusaro* were on brief, for appellants, Ilario Zannino and Peter Limone.

David Berman, with whom *Zamparelli and White* was on brief, for appellant, Lewis M. Strauss.

Joseph J. Balliro, with whom *Jay Merrill Forgotson* was on brief, for appellant, Joseph P. Balliro.

Edward F. Harrington, Special Attorney, Department of Justice, with whom *Herbert F. Travers, Jr.*, United States Attorney, and *Sidney M. Glazer*, Attorney, Department of Justice, were on brief, for appellee.

June 7, 1971.

McENTEE, *Circuit Judge*. The four defendants in these cases were convicted by a jury of transporting goods in interstate commerce knowing the same to have been stolen, in violation of 18 U.S.C. § 2314 and 18 U.S.C. § 2.[1] The evidence adduced at trial indicated that defendants Balliro and Strauss actually transported the goods in question and that defendants Zannino and Limone aided and abetted the commission of the offense.

The relevant facts date back to the robbery of Cortell's jewelry store in Boston, Massachusetts, on March 24, 1966,

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[1] 18 U.S.C. § 2314 provides in relevant part:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . . ."

18 U.S.C. § 2 provides:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

by Erwin Soroko and Charles Lombardi. After the robbery, Soroko and Lombardi met Soroko's girl friend (now his wife) Joanne at a suburban shopping center. The three drove to Joanne's parents' summer cottage in Northwood, New Hampshire, where they hid the stolen jewelry. The next day Soroko went to see defendant Balliro, his "contact man," and asked him to arrange to sell the merchandise. Balliro procured one offer, which Soroko rejected as too low.

The two met again "around 1 o'clock" on the afternoon of April 7 at the Intermission Lounge, a Boston bar owned by Balliro. Soroko indicated that he was anxious to sell the jewelry, and offered Balliro "a piece" of the proceeds. Balliro then left and returned "around half an hour to an hour later" to report that "Larry" (defendant Zannino) was "interested in the merchandise." At Soroko's request, Balliro arranged a meeting with defendants Zannino and Limone at the Intermission Lounge about 3:00 or 4:00 that same afternoon. At this meeting it was agreed that Zannino's appraiser (defendant Strauss) would look over the merchandise. The next day Soroko, Balliro, and Strauss drove to the New Hampshire cottage. After some dickering, Strauss made an offer of $60,000, which was accepted, and the three men brought the jewelry back to Boston. Soroko received payments personally from Zannino and Limone on two subsequent occasions.

In late 1966 Soroko was convicted in state court and sentenced to ten to twenty years for his part in this robbery. In 1970 he pleaded guilty in federal court to interstate transportation of the jewelry and received a six-month sentence, to run concurrently with his state sentence. Soroko and his wife Joanne were the chief prosecution witnesses at the trial of the instant cases.

Defendants Zannino and Limone contend that they cannot be convicted under 18 U.S.C. §§ 2314 and 2 since there was no evidence that they knew the jewelry was hidden outside

Massachusetts.[2] But by its terms—interstate transportation of goods "*knowing the same to have been stolen*" (emphasis ours)—the statute makes clear that the only knowledge required is that stolen goods are being transported. *United States* v. *Kierschke*, 315 F.2d 315 (6th Cir. 1953); *United States* v. *Tannuzzo*, 174 F.2d 177, 180 (2d Cir.), *cert. denied*, 338 U.S. 815 (1949); *cf. Pugliano* v. *United States*, 348 F.2d 902 (1st Cir.), *cert. denied*, 382 U.S. 939 (1965). Defendants cite *Pereira* v. *United States*, 347 U.S. 1 (1954), *United States* v. *Sheridan*, 329 U.S. 379 (1946), and *Nicolopoulos* v. *United States*, 332 F.2d 247 (1st Cir. 1964), where crimes of "causing" the interstate transportation of stolen checks and firearms have been held to require "knowledge on the part of the defendant, or, at least, reasonable grounds to know, that his conduct involves, or will result in, [interstate] commerce." *Nicolopoulos, supra*, 332 F.2d at 248. The fact that courts faced with a provision of the statute involving the word "cause" may be said to have broadened the requirements of knowledge has no present relevance.

Zannino and Limone also suggest that *Pereira* and *Nicolopoulos* apply to them because, as aiders and abettors, they have been convicted of merely "causing" Strauss to transport the goods. This argument might have some merit had they been convicted under 18 U.S.C. § 2(b). *See* note 1 *supra; United States* v. *Scandifia*, 390 F.2d 244, 248-50 (2d Cir. 1968), *vacated on other grounds sub nom. Giordano* v. *United States*, 394 U.S. 310 (1969). However, the trial court instructed the jury under § 2(a), which, for purposes of culpability, places the aider and abettor in the shoes

[2] Defendant Strauss makes this same argument. Although there was some evidence from which the jury could infer that Strauss knew he had crossed into New Hampshire, the judge took that issue from the jury by instructing them that knowledge that a state line had been crossed was not required. As we indicate in the body of this opinion, we are in accord with the trial court's ruling on this issue.

of the principal. As Judge Learned Hand explained in *United States* v. *Peoni*, 100 F.2d 401 (2d Cir. 1938), the traditional definition of aiding and abetting now incorporated in §2(a) has

> "nothing whatever to do with the probability that the forbidden result [will] follow upon the accessory's conduct; . . . [all that is required is] that he in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, that he seek by his action to make it succeed." *Id.* at 402.

Several days after the jury reached its verdict defendants moved for a new trial on the basis of newly discovered evidence. After a hearing, the trial court denied the motion. The newly discovered evidence consisted of an entry in a notebook kept by George Timmons, a Boston police officer, indicating that he had seen Soroko "about 3:30 p.m." on the afternoon of April 7, 1966, at a meat market located on Blackstone Street, Boston, owned by one Murray Alpert. This evidence directly contradicted Soroko's testimony at trial that at 3:30 p.m. on April 7 he was in the process of negotiating with Zannino and Limone at the Intermission Lounge, one mile away from Blackstone Street. Had this evidence been introduced at trial, it might have cast some doubt on the credibility of Soroko's testimony.

At the hearing, Officer Timmons testified that he went to Blackstone Street with Officer Brooks of the Boston Police Department and Lieutenant De Furia of the Massachusetts State Police sometime after attending a probable cause hearing involving Charles Lombardi, who had recently been apprehended for his part in the Cortell robbery. That hearing took place on the morning of April 7. At the meat market, the officers asked for Soroko, learned that Alpert was expecting him, and returned to their car to wait for him. Officer Timmons testified that he had no independent recollection of what time Soroko arrived and that

he did not know whether he had made the notation in his notebook that afternoon or on the following morning. The only independent recollection of the incident came from Lieutenant De Furia, who testified that it occurred "anytime after 12 o'clock to 1:00, 1:30 at the latest." At the hearing both Soroko and his wife Joanne, who had accompanied him to the market, testified that they had arrived there sometime between 11:00 a.m. and noon. They stated that, after going to the market, they return to Winthrop to feed Joanne's children during their noon lunch break from school.

The trial judge ruled that defense counsel's failure to offer this evidence at trial was not due to any serious lack of diligence on their part. As the Supreme Court has noted, courts have traditionally applied two somewhat different tests for determining whether newly discovered evidence warrants a new trial. *See United States* v. *Johnson,* 327 U.S. 106, 111 n.5 (1946). The majority rule, derived from the case of *Berry* v. *Georgia,* 10 Ga. 511 (1851), requires that the evidence "must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal." *Johnson* v. *United States,* 32 F.2d 127, 130 (8th Cir. 1929); *accord, United States* v. *Craft,* 421 F.2d 693 (9th Cir. 1970); *Hudson* v. *United States,* 387 F.2d 331 (5th Cir. 1967), *cert. denied,* 393 U.S. 876 (1968); *Anderson* v. *United States,* 369 F.2d 11 (8th Cir. 1966), *cert. denied,* 386 U.S. 976 (1967).[3] The Seventh

[3] We note that, even those circuits that purport to follow the strict *Berry* v. *Georgia* rule have failed to adhere to it in close cases. In *Newsom* v. *United States,* 311 F.2d 74, 79 (5th Cir. 1962), where the court of appeals was of the opinion that the evidence supporting defendant's conviction was weak, the district court's refusal to order a new trial was reversed on the ground that "[a]nother jury may reasonably find [the newly discovered evidence] sufficiently credible to raise a reasonable doubt as to . . . the defendant's guilt." And in *Mejia* v. *United States,* 291 F.2d 198 (9th Cir. 1961), where the newly discovered evidence consisted of an alibi witness, the court

Circuit rule, first announced in *Larrison* v. *United States*, 24 F.2d 82, 87-88 (7th Cir. 1928), is somewhat less stringent. Under the *Larrison* rule a new trial must be granted if, on the basis of the newly discovered evidence, "(a) The court is reasonably well satisfied that the testimony given by a material witness is false [and] (b) That without it the jury *might* have reached a different conclusion." *Id.* at 87; *accord*, *Gordon* v. *United States*, 178 F.2d 896, 900 (6th Cir. 1949). By "false" is meant deliberately false or "false swearing." *See United States* v. *Johnson*, 142 F.2d 588, 592 (7th Cir. 1944). The Second Circuit appears to have adopted the practice of testing the evidence against both standards, *see United States* v. *Miller*, 411 F.2d 825, 830 (2d Cir. 1969); *United States* v. *Lombardozzi*, 343 F.2d 127 (2d Cir.), *cert. denied*, 381 U.S. 938 (1965), before refusing to grant a new trial.

At the conclusion of the hearing the trial judge made a finding of fact that "the episode at the meat market most probably occurred between 12 and 1 o'clock." In effect, he concluded that he believed the testimony of the only officer who had a direct recollection of when the incident occurred. This finding is supported by Timmons' testimony that it was often his practice not to make entries in his notebook until the following day.[4] The trial judge also concluded that the introduction of the notebook entry would

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reversed because the jury "might" come to a different conclusion in light of the new evidence. *See also Griffin* v. *United States*, 336 U.S. 704, 708-709 (1949). Thus, the *Berry* rule is apparently not applied where the new evidence casts substantial doubt on defendant's guilt. In the instant case, however, it is clear from the trial court's findings following the hearing that the new evidence cast no such doubt. *See* discussion *infra*.

[4] We note that, although Timmons testified that he observed Soroko's car for approximately thirty minutes, only the first three digits of the license plate number were recorded in the notebook. This evidence lends additional support to the conclusion that the notation was not made at the time the incident occurred.

not "probably produce an acquittal." *Berry* v. *Georgia*, *supra*. He noted that Soroko had been subject to "scathing cross-examination" at trial and, although his testimony was corroborated in only minor respects, it nevertheless had the "ring of truth" in all its essential particulars.[5]

Thus, a new trial is not warranted here under either of the traditional tests discussed *supra*. The *Larrison* rule is inoperative since the trial court concluded that Soroko's trial testimony was not false. The record amply supports both that finding and the court's evaluation of the newly discovered evidence in light of the *Berry* v. *Georgia* standard. In a case such as this, where the overriding question is the possible impact of newly discovered evidence on the credibility of a key prosecution witness, we must affirm the findings of the trial court so long as there is evidence to support them. *United States* v. *Johnson*, *supra*, 327 U.S. at 111-112.

At the sentencing, the trial judge stated that he based his decision to sentence defendants Zannino and Limone to seven years, rather than five, on reputation testimony presented before two Senate committees to the effect that they are prominent members of a criminal syndicate in the Boston area. The Supreme Court has held that a sentence based on an "extensively and materially false" foundation which the defendant had no opportunity to correct cannot stand. *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948). How-

[5] As the court noted, if Soroko had visited the meat market between 12:00 and 1:00, he could not possibly have made it back to the Intermission Lounge from Winthrop by 1:00. The court pointed out, however, that the evidence at trial also suggested that Soroko had arrived at the Lounge later than his testimony indicated. The court inferred that the jury had probably concluded that Soroko's testimony was inaccurate as to the precise times of day but that the events to which he had testified were essentially accurate. We note that, even if Soroko had not arrived at the Intermission Lounge until 2:00, there was ample time for him to speak with Balliro, wait for an hour, and then meet with Zannino and Limone before the end of the afternoon.

ever, it is also well established that the sentencing judge may properly consider hearsay evidence regarding a defendant's "past life, health, habits, conduct, and mental and moral propensities." *Williams* v. *New York*, 337 U.S. 241, 245 (1949); *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965). Although the judge failed to articulate why he thought this evidence warranted an additional two years, we note that membership in a criminal syndicate is clearly relevant to questions of corrigibility and likelihood of reformation in a short period of time. *See generally Williams* v. *New York, supra*, 337 U.S. at 247-50. We also note that the evidence in question was not idle gossip but sworn testimony presented in the course of formal congressional investigations. And, both defendants and their counsel were given an opportunity to attempt to rebut this evidence. *Cf. Williams* v. *Oklahoma*, 358 U.S. 576, 583 (1959); *Verdugo* v. *United States*, 402 F.2d 599, 613-16 (9th Cir. 1968) (Browning, J., separate opinion), *cert. denied*, 397 U.S. 925 (1970).

Defendant Strauss takes the position that the trial court should have directed a verdict of acquittal on the ground that the government's case was based almost entirely on the uncorroborated testimony of an accomplice. But it is well established that acquittal must be directed in this type of case only if the accomplice's testimony is "incredible or unsubstantial on its face." *United States* v. *Brooks*, 422 F.2d 367, 368 (9th Cir. 1970); *Tillery* v. *United States*, 411 F.2d 644, 647 (5th Cir. 1969). This is not such a case.

Defendants Zannino and Limone argue that the court erred in refusing to give a cautionary instruction regarding the testimony of Joanne Soroko because she too was an admitted accomplice. Technically there was no evidence that Joanne aided and abetted the commission of the crime of interstate transportation, but, inasmuch as she admitted to being an accomplice to several robberies performed by her

husband, the instruction would better have been given.[6] We conclude that this error was harmless, however, since an adequate cautionary instruction was given regarding Erwin Soroko and much of that instruction referred to the other witnesses as well. We also note that Joanne's testimony generally concerned peripheral matters and was not essential to the government's case.

We deal summarily with defendants' remaining contentions. Although it was improper for the prosecutor to suggest in his concluding statement that the defendants are members of a "criminal element," the judge corrected the error by explaining to the jury that the statement was intended to refer to the prosecution's own witness Soroko, not to the defendants. With regard to the testimony before the grand jury, the defense has shown no abuse of discretion in the court's order that only the testimony of Soroko and Lombardi be revealed. *See generally Dennis* v. *United States*, 384 U.S. 855, 868-75 (1966). Defendants also argue that the jury should have been instructed that, if two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, the jury should adopt the one of innocence. While such an instruction would have been proper, *McCoy* v. *United States*, 169 F.2d 776, 785-86 (9th Cir.), *cert. denied*, 335 U.S. 898 (1948), there was no error in the judge's failure to give it inasmuch as he gave the "hesitate to act" test expressly approved by the Supreme Court. *Holland* v. *United States*, 348 U.S. 121, 140 (1954). Finally, the judge's statements to the jury regarding their

[6] The trial court based its refusal to give this instruction in part on defendants' failure to put their request for it in writing. But that is not a valid basis for refusal in this case since the judge had indicated before the written requests were submitted that he intended to give the instruction and made clear afterwards that he had given it full consideration. *See* Fed. R. Crim. P. 30; *Hull* v. *United States*, 324 F.2d 817, 824 (5th Cir. 1963).

hotel accommodations merely showed solicitude and concern for their well-being and had none of the dangers of possible coercion inherent in a *Tuey* instruction. *See Commonwealth* v. *Tuey*, 62 Mass. (8 Cush.) 1 (1851).

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1037

UNITED STATES OF AMERICA,
APPELLEE,

v.

ILARIO ZANNINO,
DEFENDANT, APPELLANT.

JUDGMENT

Entered: June 7, 1971

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Messrs DiMento and Harrington.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1039

UNITED STATES OF AMERICA,
APPELLEE,
v.
PETER LIMONE,
DEFENDANT, APPELLANT.

JUDGMENT

Entered: June 7, 1971

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Messrs DiMento and Harrington.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 71-133 G
Criminal No. 70-317 G

UNITED STATES OF AMERICA
v.
ILARIO ZANNINO, ET AL.

MEMORANDUM OF DECISION DENYING DEFENDANT'S POST-TRIAL MOTIONS

January 11, 1971

GARRITY, J. In support of their motions for judgments of acquittal or for new trials, defendants in these consolidated cases have offered evidence to the effect that the Government's key witness Soroko was doing an errand at a meat market over a mile away at the time when, according to his testimony at the trial, he was engaged in critically incriminating conversations with the defendants Balliro, Zannino and Limone in a cocktail lounge in which he was employed. According to Soroko's testimony at the trial, he and these three defendants on the afternoon of Thursday, April 7, 1966, planned and discussed the offense allegedly committed on the following day.

At hearings on defendant's motions, defendants introduced testimony by two City of Boston police detectives who interviewed Soroko and his then girlfriend Joanne, now Mrs. Soroko, at the meat market on the afternoon of April 7. One of the officers recorded the interview in a "filler" kept by him as having occurred at about 3:30 P.M. The "filler" was received as an exhibit and is a small blue-covered notebook containing a rough accounting of the detectives' activities for each day while on duty, together with mention of the weather and temperature on most days and the name of the police sergeant conducting the daily roll call. Independently of the entry in the filler, neither detective had any memory of the time of the interview other than that it was in the afternoon. The Government called as a witness a state police detective who had accompanied the Boston police officers on the occasion in question and he testified that the interview had occurred during the early afternoon, "anytime after 12 o'clock to 1:00, 1:30 at the latest." All the officers recalled attending a criminal hearing in the Boston Muni-

cipal Court on the morning of the day in question and much evidence was received in an effort to establish the time when the court hearing ended. Other than the fact that it must have ended sometime before noon, because the prisoner involved in the hearing was back at the Charles Street Jail at 12:25 P.M., this evidence was not probative.

Soroko and his now wife were called as witnesses by the court and she testified that the interview at the meat market was not in the afternoon but "closer to around noontime."[1] Mr. Soroko testified, "around 11 o'clock . . , quarter past 11, 11:30 at the very latest." The testimony of another witness, Alpert, was too vague to be helpful, because geared to his lunchtime which occurred anytime between 11 and 3:30.

At the trial Soroko testified that he arrived at the coctail lounge around 1 o'clock in the afternoon and had dealings there as late as 5:00 P. M. At the hearing on the instant motions Soroko testified, and the court finds, that after arriving at the cocktail lounge on the afternoon of April 7, 1966 he stayed there continuously, i.e., did not leave for the purpose of doing an errand at the meat market.

The crucial question presented is whether the new evidence, in combination with affidavits filed in support of the motions but of lesser significance and not discussed in detail, showed that Soroko's original testimony at the trial was false. *United States* v. *Johnson*, 1946, 327 U.S. 106, 111. As stated in a memorandum filed by the Government, if Soroko's presence at the meat market is irreconcilable with his having been at the lounge on the afternoon in question, obviously a new trial should be ordered.

The court believes Soroko's trial testimony despite the

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[1] At the trial she was asked one question about the episode during cross-examination by defense counsel and she stated, "I truly don't remember."

evidence received at the hearings on the post-trial motions and the assertions in supporting affidavits. The court finds as a fact that the Boston detective's filler entry of an interview at about 3:30 P.M. was mistaken. It is obvious from the handwriting in the exhibit and consistent with the author's practice, that the entry was made on the following day and not contemporaneously with the incident. The court also finds that the episode at the meat market most probably occurred between 12 and 1 o'clock. This was the time testified to by the state police detective, the witness with the clearest direct recollection.

The court's finding as to the time of the interview is at variance with the testimony of Soroko. Also, the court's finding conflicts to some extent with the trial testimony of Soroko that he arrived at the cocktail lounge at around 1 o'clock, inasmuch as both Soroko and his wife testified at the hearing on motions, and the court finds, that they drove to Winthroup and Soroko had lunch there before returning to the coctail lounge in Boston. Fundamentally, the court finds that Soroko was mistaken as to precise times of day in his testimony about events on April 7 given at the hearing and at the trial. His testimony as to hours of the day was an estimation. At the trial, when testifying about the first conversation with a defendant on April 7 and asked, "And what time of day was this discussion?" Soroko answered, "Early in the day." And when asked to be more specific stated, "Around 1 o'clock, I'd say." Apparently his work at the lounge commenced in the late afternoon and to him "early in the day" was early afternoon.

In ruling upon this aspect of defendants' post-trial motions the court has applied the standard whether a new trial is required in the interest of justice, as explained in *Brodie* v. *United States*, D.C. Cir., 1961, 295 F.2d 157. Upon consideration of all the testimony at the trial and

on the motion hearings, together with affidavits supporting the motions, the court finds Soroko's testimony to be credible in its essentials although inaccurate as to times of day.

The court has also tested the defendants' motion against the criteria for granting new trials on the ground of newly discovered evidence as stated in *United States* v. *Miller*, 2 Cir., 1969, 411 F.2d 825, 830. It finds that although the evidence offered at the post-trial hearings might have been discovered during the trial by defense counsel, failure to offer it during the trial was not due to any serious lack of diligence on the part of defense counsel.[2] The further issue thus arises whether the new evidence is so material that it would probably produce a different verdict if a new trial were granted. The court believes not. The credibility of Soroko was attacked vigorously by four experienced defense counsel at the trial. He was subjected to thorough, scathing crossexamination. Several witnesses testified and considerable circumstantial evidence was received indicating that Soroko was testifying falsely against the defendants and deliberately "framing" them in order to escape prosecution himself for several crimes which he admitted committing. His testimony incriminating the defendants was corroborated in only minor respects. Nevertheless it had the ring of truth in all its essential particulars and he testified with convincing candor.

Would the testimony received on the post-trial motions and proffered in the affidavits, when added to the testimony at the trial, probably lead a new jury to conclude that Soroko did not meet three of the defendants at the Intermission Lounge on the afternoon of April 7 and ar-

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[2] Without describing all of the attendant circumstances, suffice it to state that an error in a date in one memorandum, received as Exhibit 3 at the hearing, and Mrs. Soroko's lack of memory about the incident, when testifying at the trial, among other circumstances, explain defense counsel's failure to offer the evidence at the trial.

range for the commission of the alleged crime on the following day? No. The new evidence proved only that Soroko was mistaken in his recolelection of the time of day of certain events on April 7. However, in the light of the testimony of various defense witnesses, especially that of former FBI Agent Boland, the trial jury in all probability reached the same conclusion. In the court's opinion the jury weighed the conflicting, though for the most part not flatly contradictory, testimony of Soroko and various defense witnesses and, mindful of the fact that it concerned events more than four years preceding the trial, found Soroko's testimony to be inaccurate as to precise times of day but accurate about the series of meetings on April 7 and what transpired at them. The court concludes that the addition of the testimony received at the hearings on the instant motions to the evidence at the trial would probably not produce an acquittal for any of the defendants.

This memorandum deals with only one of the several grounds urged by the defendants in support of their motions. The court has, however, considered the other grounds and the memoranda and arguments made in support thereof. None of them, in the court's opinion, warrants setting aside the verdicts of the jury or allowing the motions for judgments of acquittal or for new trial. Accordingly, the motions are denied and the cases will stand for disposition on January 18, 1971 at 2:00 P.M.

(s) W. Arthur Garrity, Jr.
United States District Judge